



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 730 OF 2015 (FORMERLY KISUMU HCC NO. 171 OF 2010)

FREDRICK JUMA AHIJA

SAUL OTIENO AHIJA (Suing as the administrator of the estate of OWINO

AHIJA NYAGOL (Deceased).....PLAINTIFF

VERSUS

JASON OYOLA OPENDA.....1ST DEFENDANT

DISTRICT LAND REGISTRAR, BONDO.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

After the plaintiff had closed his case, **MR. OMONDI** Counsel for the 1st defendant sought leave to file a fresh document being the confirmed grant in **KISUMU HIGH COURT SUCCESSION CAUSE NO. 84 of 2000**.

MS ESSELI Counsel for the 2nd and 3rd defendants had no objection.

Mr. OLEL Counsel for the 1st defendant objected stating that not only is this an old case filed in 2010 but also that the plaintiff has closed his case and will be prejudiced. Further, that no reasons were given for not availing the confirmed grant earlier.

I have considered the application and the objection thereto.

In order to ensure orderliness and prevent trial by ambush, the **Civil Procedure Rules** require parties to furnish their evidence to their adversaries before the commencement of the trial. That is why **Order 3 Rule 2 of the Civil Procedure Rules** provides that:

“All suits filed under rule 1 (1) including suits against the government, except small claims, shall be accompanied by:-

a) the affidavit referred to under Order 4 rule 1 (2);

b) a list of witnesses to be called at the trial,

c) written statements signed by the witnesses excluding expert witnesses;

and

d) copies of documents to be relied on at the trial including letter before action.

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11”

A similar provision is found in **Order 7 Rule 5 of the Civil Procedure Rules** with respect to a defendant.

Neither **Order 3 nor 7 of the Civil Procedure Rules** bar a party, subject to the leave of the court, from filing new documents even after the

trial has commenced. That is clearly in keeping with the provisions of **Article 50 of the Constitution** which provides for a fair hearing of any dispute. The primary duty of a court is to do justice to the parties by allowing them to present all the relevant evidence in support of their respective cases. However, each case must be considered on the basis of its own peculiar circumstances. Some of the factors that the court will consider when an application for leave to file further documents is made will therefore include; the reason why the said documents were to be filed as provided under **Orders 3 and 7 of the Civil Procedure Rules**, the stage at which the application is made and any prejudice that may be caused to the other side. In the case of **MARUS KIRANGA NIMROD & ANOTHER V. NESSY KUTHII JUSTUS KEROGOYA ELC CASE NO. 737 of 2013 (2017 eKLR)**, I allowed the plaintiff leave to file further documents after the hearing had commenced. In doing so, I took into account the fact that the document sought to be introduced was not previously available at the time of filing the suit and, most importantly, the plaintiff had not yet closed his case and therefore, the defendant would have an opportunity not only to file any further documents if he so wished but also cross-examine the plaintiff on the new evidence. That way, no prejudice would be caused to the defendant and a fair trial will be compromised. In this, and as rightly pointed at by Mr. **OLEL**, the plaintiff has already closed his case and will be highly prejudiced as he will not be in a position to rebut such evidence. The defendant has also not told us why the document sought to be produced was not filed at the appropriate time and served by the plaintiff as required. This is also an old case filed way back on 9th November 2010 and when both parties appeared before Hon. ODAWO the Deputy Registrar on 26th September 2018 to confirm their readiness for trial during the service week, they all confirmed their readiness to proceed and took the hearing date by consent. Parties must also now appreciate that with the advent of the **“Oxygen Rules”**, courts will no longer take a laid back approach to litigation but will instead guide the process to ensure among others, the expeditious disposal of disputes. That is why when faced with a similar scenario in **FLAVERMART ENTERPRISES LTD V. KENYA RAILWAYS CORPORATION KISUMU ELC NO. 48 OF 2013** where an application to file further documents was made by the defendant after the plaintiff had closed its case, I declined to allow it citing prejudice to the plaintiff. If parties are allowed to introduce fresh evidence at any stage of the trial even without considering the prejudice that may be caused to the other party, then that will in itself be an impediment to the very fair trial that the Constitution envisages.

The up-shot of the above is that I find the application by the defendant to introduce new evidence has come late in the trial and allowing it will be highly prejudicial to the plaintiff. That application is therefore declined.

B. N. Olao

Judge

9th November 2018

Ruling delivered in open court this 9th day of November 2018.

Mr. Anyul for Mr. Olel for plaintiff- present

Mr. Munong’o for 1st defendant – present.

Ms. Esseli for 2nd defendant – absent.

Dorothy Mirasi Court Assistant – present.

B. N. Olao

Judge

9th November 2018